

Eurojust and Joint Investigation Teams: How Eurojust can support JITs*

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Abstract The author analyses the contribution Eurojust can make to the successful setting up and operation of JITs by explaining the nature and role of Eurojust, the concept of a JIT, its uniqueness and the opportunities for cross-border co-operation created by JITs in the Member States, as well as the difficulties related to the JIT concept. The author shows how Eurojust can both help to overcome these problems and support JITs either via the Member States' national legislation or via the provisions of the Eurojust Decision.

Keywords Eurojust · Joint Investigation Teams · Judicial Cooperation in Criminal Matters · Legal Framework

Introduction

When one looks at the Decision setting up Eurojust (hereinafter referred to as the “Eurojust Decision”)¹ and the Framework Decision on joint investigation teams (hereinafter referred to as the “Framework Decision”),² it is immediately clear that

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¹ Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the Fight against Serious Crime (2002/187/JHA), OJ L63 of 6.3.2002, p. 1.

² Council Framework Decision of 13 June 2002 on Joint Investigation Teams (2002/465/JHA), OJ L162 of 20.6.2002, p. 1. This instrument will cease to have effect once the Convention of Mutual Assistance in Criminal Matters between the Member States of the European Union (Council Act of 29 May 2000, 2000/C 197/01, OJ C197 of 12.7.2000, p.1) has entered into force in all Member States (Article 5 of the JITs Framework Decision), as the JITs Framework Decision only copies Article 13 of this Convention (note: at the time of writing, this Convention is currently lacking 7 ratifications: Bulgaria, Greece, Italy, Ireland, Luxembourg, Malta and Romania).

there is a specific link between them: not only are both Eurojust and JITs based on EU instruments adopted under Title of the Treaty on European Union ('Third Pillar'), which focus on the fight against cross-border crime; they both share the aim of better co-ordination of investigations of cases of cross-border crime. So there is a certain parallelism in the objective setting of the two instruments.

The question therefore is how the two instruments relate to each other. This shall be analysed in accordance with the following three steps: first, an outline shall be given of what Eurojust is, what its role is and how it fulfils this role (2.); second, the concept of a JIT and the difficulties involved in setting up and operating a JIT shall be considered so that potential needs can be identified (3.); finally, the way in which Eurojust can support JITs shall be examined (4.).

1. The nature and role of Eurojust

Eurojust is a permanent body with legal personality, situated in The Hague, to which each Member State seconds a judge or prosecutor, the "national members".³ The advantage of this concept is that experts from all Member States work together in the same building, next to each other, so that they can communicate spontaneously and informally without any bureaucratic obstacles. As each national member has significant expertise in the national criminal substantive and procedural law of his/her home country, there is a quick and non-bureaucratic exchange of information between the national members. Furthermore, as there are permanent contacts between the national members and their home countries, Eurojust can liaise with the different national judicial authorities.

This facility to establish efficient information flows is of high importance for the fulfilment of Eurojust's role, which is to enhance efficiency of the national investigating and prosecuting authorities, when dealing with serious cross-border crime. According to Article 3 of the Eurojust Decision, Eurojust's tasks, besides the general support of competent authorities in the Member States, are twofold: first, to stimulate and improve co-ordination between the competent authorities of the Member States of investigations and prosecutions in the Member States (this task is mainly carried out by gathering and transmitting relevant information in criminal cases, providing legal expertise on national criminal laws and organising co-ordination meetings on cases referred to it); second, to improve co-operation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance requests and the implementation of extradition requests.

2. The concept of a JIT and its difficulties

2.1 The JIT concept

A JIT, according to Article 1 of the Framework Decision, is a team set up for a specific purpose and a limited period consisting of representatives of law enforcement and other authorities of different Member States jointly investigating cases of inter-

³) Article 2(1) of the Eurojust Decision.

national crime or cross border crime. This concept has several advantages: It enables co-ordination of a case between investigating authorities of different Member States from the outset of investigations, so that all related investigations have a co-ordinated approach. It also presents a possibility for the participating Member States to be involved in the decision-making process regarding which investigating activities are undertaken by the other participating Member States, and allows participating Member States to be informed in real time of the state of the investigation, as the seconded members can be present when investigative measures are carried out⁴. Furthermore, when the team requires investigative measures to be taken in a participating country other than the country hosting the JIT, the members seconded by that Member State may request their competent authorities to take those measures. This again increases efficiency, as according to Article 1(7) of the Framework Decision, these measures shall be considered as being requested during the course of a national investigation. It can therefore be said that the concept of a JIT is beneficial for all complex cases involving several Member States, in particular where international aspects and connections would risk being overlooked in national investigations.

2.2 Difficulties involved in setting up and operating a JIT

It is clear that the concept of a JIT, which allows the participation of law enforcement and judicial personnel from several States in one investigation, can be advantageous for the investigation of offences with a strong cross-border dimension (see above 2.1). However, until now not much use has been made of this tool, which the Member States were supposed to implement by 1 January 2003⁵ at the latest. One reason for this is late implementation by several Member States; another is that a series of difficulties have yet to be overcome. Apart from the usual problems of international co-operation which are, among others, linked to limited human and financial resources and differences in language, culture, and investigation strategies and techniques, there are several “JIT specific” difficulties involved in setting up and in operating a JIT, which shall now be examined.

Once a suitable case has been identified, the competent authorities of the countries involved have to be brought together, and they have to agree on the details of the JIT. Although the Council has set up a model agreement which indicates the different elements,⁶ establishing the agreement still presents a problem, not only because of differing political intentions but also due to uncertainty about the varying legal frameworks of the different countries which are not always reconcilable.

Some legal questions can be solved when establishing the agreement; others will arise during the operation of the JIT. In particular when it comes to the gathering

⁴) Article 1(5)(c) Framework Decision.

⁵) Article 4(1) Framework Decision. The deadline for implementing this instrument was fixed as the date of accession for new Member States as set in a Declaration from the European Council in June 2004.

⁶) Council Recommendation of 8 May 2003 on a Model Agreement for setting up a Joint Investigation Team (JIT) (2003/C 121/01), OJ C121 of 23.5.2003, p.1. As this is only a recommendation, there is no obligation for the Member States to use the model agreement. In any case, even if the model agreement is not used, the agreement should specify the participants, the purpose of the JIT, the scope of the JIT, the period for which it is established, the Member State(s) where the JIT will operate, the leader, the possibility to carry weapons for the team members, the language to be used, and the participation of other persons.

of evidence, and despite Article 1(10) of the Framework Decision,⁷ it is difficult to ensure that the investigations are carried out in such a way that, irrespective of the participating State in which the information has been collected, such information can later be used as evidence and will not be considered as inadmissible. In this regard, when setting up a JIT, careful consideration should be given to the future location of the prosecution in order to ensure compliance with the conditions for evidence to be admissible in this/these Member State(s).⁸ Moreover, JITs agreements should contain information on methods for gathering evidence.⁹

Further difficulties may arise if, during the course of the operation of the JIT, the agreement has to be amended, e.g. if parties to the agreement are added, new connections to other countries become apparent, or if the scope extended where different crimes are linked to each other. Moreover, additional States or further persons may have to be added, in accordance with Article 1(8) and (12) of the Framework Decision. In this case, the right contact points have to be found quickly and the necessary formalities completed, to avoid any needless loss of time.

Overcoming such difficulties has sometimes hindered the setting up of a JIT, where it could have been the appropriate instrument for a successful fight against cross-border organised crime.

3. How can Eurojust support JITs?

Before considering Eurojust's role, it should be mentioned that there is nothing explicit on this matter in the Framework Decision.¹⁰ However, Eurojust can provide support to JITs on the basis of national legislation (3.1) as well as on the basis of its own legal framework (3.2).

3.1 National legislation

National legislation can serve as legal basis for Eurojust to support JITs when it defines the powers of the national member. Where national legislation upholds the powers of a national member as a national prosecutor, the national member can for example participate as a national prosecutor.

Furthermore, in accordance with Article 1(12) of the Framework Decision, national implementing laws may foresee that persons other than representatives of competent authorities of the Member States setting up the JIT can take part in the activities of the team. Accordingly, these members can also be representatives of Eurojust.

⁷ Although this paragraph only talks of "information", it was presumably intended to enable the direct use of evidence in all participating countries. However, national legislation of the Member States does not necessarily allow this.

⁸ Conclusions of the Second Meeting of the National Experts on Joint Investigation Teams, Council Document 15023/06, 21 November 2006.

⁹ Conclusions of the Second Meeting of the National Experts on Joint Investigation Teams, Council Document 15023/06, 21 November 2006.

¹⁰ The Council Model Agreement contains an "appendix to the model agreement on the establishment of a joint investigation team" for arrangements with Eurojust, Europol and other bodies to participate in JITs.

Some Member States' legislation even specifically mention Eurojust's involvement; e.g. Belgian law foresees that Eurojust members may be present at the execution of investigative measures of judicial investigation, after approval of the leader;¹¹ Irish law provides that Eurojust shall provide advice to the teams,¹² and Lithuanian law provides that Eurojust has to be informed when problems are encountered and solutions are sought.¹³

3.2 Eurojust's own legal Framework

Apart from these possibilities, Eurojust can also support JITs on the basis of its own legal framework. As it has legal personality, it can conclude agreements which may also bear upon JITs.

Eurojust can support JITs as part of its co-ordination role:

- Eurojust can help identify operational cases which are suitable for JITs, through its co-ordination work. This has happened in the past, and it seems likely that such a scenario will occur more frequently in the future. For example, a country may request Eurojust to help with the co-ordination of a cross-border case and it may transpire during the co-ordination work that a JIT would enhance the efficiency of the investigation;
- the Eurojust Decision foresees a possibility for Eurojust to ask the competent national authorities to consider setting up a JIT, either acting through its national member (Article 6) or through the totality of its national members (i.e. via the College; Article 7). According to Article 6, national members *may ask* the competent authorities *to consider* setting up a JIT; this represents a simple right for Eurojust to request the Member States concerned to reflect on the possibility of setting up a JIT in a particular case. Article 7 contains a stronger power: the College *may ask* the competent authorities *to set up* a JIT. In this case the authorities must give their reasons if they decide not to comply.¹⁴ Whilst this stronger power of the College does not contain an obligation on the respective Member States to comply, such Member States are nevertheless required to respond and to provide reasons in the event that a negative decision is taken. Thus, Eurojust can bring relatively strong moral if not legal pressure to bear on the state concerned;
- Eurojust can support the negotiations for JITs agreements. As mentioned above, Eurojust has legal expertise regarding the different national legal systems, and it has experience with the co-ordination of cases. It can therefore help with the legal aspects of setting up JITs, e.g. in relation to the scope of the agreement, which will be relevant for the admissibility of information gathered as evidence;
- Eurojust can also help in the course of the operation of the JIT, when questions arise for instance concerning the means of gathering information;

¹¹) Article 9(3) of the Law of 9 December 2004 concerning Mutual International Legal Assistance in Criminal Matters.

¹²) Section 9(1) and (2) of the Criminal Justice (Joint Investigation Teams) Act 2004.

¹³) Article III Section 7, Article IV Section 11 and Article VII Section 31 of the "Recommendations on the establishment and Operation of Joint (combined) International Investigation Teams" approved by the Prosecutor General of the Republic of Lithuania by order of 21. 12. 2004.

¹⁴) Article 8 of the Eurojust Decision.

- Eurojust can provide facilities for meetings.¹⁵ Eurojust can provide facilities to meet in a secure environment. It has a soundproofed meeting room and it can provide technical means for secure communication. Furthermore, it can, where necessary, and within limits, cover travel expenses and hotel accommodation. The option of enabling Eurojust to provide more substantial financial support to JITs is currently under discussion;¹⁶
- Eurojust can follow the work of the JIT and react to its operation. In particular, it can help ensure that national procedural requirements for the gathering of evidence are safeguarded, so that later on the evidence can be used in court proceedings;
- Eurojust can also help with the involvement of other (non-participating) countries. On the basis of its casework, it can judge whether other countries deal with cases which might be linked, and whether the involvement of other countries could be helpful. It can also help them to obtain assistance from Member States other than those who set up the JIT and establish contact with the competent authorities of other countries;¹⁷
- Eurojust (together with Europol) plays a key role in supporting the JITs national experts network which was set up in 2005.¹⁸ To this end, two meetings took place gathering those experts in order for them to meet and exchange experience. A guide containing the Member States' legislation on JITs has also been put together by both organisations and disseminated in November 2006.¹⁹ Finally, a webpage will be placed on Eurojust's and Europol's respective websites in order to raise awareness as regards JITs in general and concerning the JITs national experts network in particular; and operational guidelines on how to set up JITs are currently being elaborated in order to assist those experts in their tasks.

Conclusion

Eurojust and JITs both share the aim of better co-ordination of investigations of cases of cross-border crime. Until now little experience has been gathered with JITs, due to the late implementation of this instrument, but also due to practical and legal difficulties linked to the setting up and operation of JITs. However, a number of initia-

¹⁵ Article 7(g) of the Eurojust Decision.

¹⁶ This could be done via the financial framework partnerships launched by the Commission, among others the "Programme – Prevention of and Fight against Crime – Call for Framework Partner" published by the Commission on 6 February 2007.

¹⁷ Eurojust has contact points in several other States, including Turkey, Croatia, Liechtenstein, Norway, Switzerland, Iceland, Western Balkans, USA, Canada, Russia, Ukraine, FYROM, Israel, Japan, Singapore, and in most States of South America. Eurojust can therefore facilitate the information flow also outside the European Union. It has also concluded co-operation agreements with Norway, Iceland and USA. Furthermore, there are liaison magistrates from Norway and USA located at Eurojust, and the number of liaison prosecutors originating from third States based at Eurojust is likely to increase in the future.

¹⁸ See "CATS – Joint Investigation Teams – Proposal for Designation of National Experts", Council Document 11037/05, 8 July 2005. This network was created among others as a direct follow-up to The Hague Programme, section 2.3. thereof which indicated that "with a view to encouraging the use of such [Joint Investigation] teams and exchanging experiences on best practice, each Member State should designate a national expert" (The Hague Programme, Annex I to the Conclusions of the European Council, 4–5 November 2004).

¹⁹ See article by Horvatits and de Buck in this issue, for further details.

tives are currently underway, which aim to encourage their use. Eurojust's role is to be seen in this context: its expertise in cross-border co-operation, in particular in co-ordinating operational cases, its international contacts and its facilities all serve to make it a key player in helping Member States to overcome these difficulties and in maximising the use of this innovative EU instrument.